

TANZANIA / JUDGMENT

MHUBIRI ROGEA MONGATEKO v MAK MEDICS

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29 September 2023

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IN THE HIGH COURT OF TANZANIA (LABOUR DIVISION) AT MWANZA LABOUR REVISION NO. 37 OF 2023 (Arising from the ex-parte award in original Labour Dispute No. CMA/MZ/NYAM/12/2014, Mwanza by Hon. Doris Wandiba – Arbitrator on 29th September, 2023)
MUHUBIRI ROGEA MONG'ATEKO APPLICANT VERSUS MAK MEDICS LTDRESPONDENT

JUDGMENT

26th March & 24th May 2024 ITEMBA, J. The applicant Mhubiri Rogega Mong'ateko, was employed by the respondent MAK Medics Limited on permanent basis as 'drugs order recorder' as from 1/6/2007. On 15/8/2012, his employment was terminated and by that time he was receiving a salary of TZS. 485,000/=. The ground for termination were that, he occasioned a loss of TZS 150,000,000/= to the respondent. Upon termination, he lodged his dispute before the Commission for Mediation and Arbitration (the CMA). From there onwards, there is quite a history because the dispute has voyaged from the CMA to the High Court, 1 back to the CMA, again to the High Court, to the Court of Appeal, back to the CMA and now for the third time, the dispute is before this court. In its award, the CMA has narrated the background in details, I will not attempt to redo it. It suffices to state that, at the very first time before the CMA, the applicant's claims were dismissed for want of prosecution. Being dissatisfied, the applicant knocked the High Court's doors applying for revision against the CMA decision and the said application was struck out for being incompetent. The applicant unsuccessfully applied for an extension of time to file his dispute before the CMA. He then went to the High court where his case was restored and it was ordered to be heard on merit. Upon hearing, an award was issued by the CMA in the respondent's favor. Again, the applicant was disgruntled. Still determined, he applied for revision before the High Court, an application which did not bear any fruits. He finally appealed to the Court of Appeal where all the lower courts' proceedings were nullified due irregularity in the CMA proceedings and a retrial was ordered. Yet, following a retrial which was heard ex parte, the CMA, partly dismissed the applicants' claims on grounds that the termination of employment was substantively fair but procedurally unfair. Further, the CMA decided that because the termination was procedurally 2 unfair, the applicant deserves only 12 months salary and a certificate of service. The applicant is aggrieved by the said decision hence this revision

application. I have to point out that, before hearing of the application, the applicant raised 8 grounds of preliminary objections attacking the counter affidavit, which can be summarised as follows:

- i. The counter affidavit was filed late, beyond the 8/11/2023, the date issued by the court. ii. The counter affidavit and its verification clause is fatally and incurably defective for containing un-numbered pleaded paragraphs in contravention of the mandatory provisions of rule 15(2) of Order VI of the CPC Act, Cap. 33 R.E. 2019. iii. The counter affidavit is bad in law, for the deponent one Inosencia Awuor has testified on the facts which are not from her own knowledge and there is non-disclosure of the source of the said of information an act that violates rule 3(1) of the CPC Act (supra). iv. The counter affidavit offends the law, for it has been drawn signed and filed by an unappointed/unauthorized representative contrary to mandatory provisions of rule 43(1)(a) & (b) of the Labour Court Rules GN. No. 106 of 2007. Following these grounds, the counter affidavit was expunged from records with reasons to follow. Therefore, as promised, I will start with 3 grounds for dismissing the respondent's counter affidavit. As per the records, indeed, the respondent was ordered to file his counter affidavit on or before 8/11/2024. However, without leave of the court, the respondent filed his counter affidavit on 10/11/2023 which was a delay of 2 days. The law is settled that, court orders must be respected. In the case of Shabani Amuri Sudi (the administrator of the estate of the late Amuri Sudi Vs. Kazumari Hamisi Mpala, Misc. Land Application No.30 of 2019, (HC –unreported), this Court had this to say: "Court orders must be respected, obeyed and complied with religiously. Likewise, court proceedings are controlled by the presiding judge or magistrate, parties cannot decide to do contrary to the court's order. Tolerating them will amount to voluntary invitation to judicial chaos, disrespect and injustice." (Emphasis supplied) See also the cases of Laemthong Rice Co. Ltd v Principal Secretary Ministry of Finance Zanzibar, Civil Appeal No. 259 of 2019; and Mary Joseph v Rachel Zephania, Misc. Land Application No 37 of 2020 (both unreported). It goes therefore, for proper administration of justice, non observance of courts orders, cannot be condoned by any court of law. I have gone through the counter affidavit, the deponent states that 4 he was served with the application late through 'EMS'. This might have been the fact but, it is not supported by any evidence, secondly, the respondent's counsel should have sought the court's leave to extend time to file his counter affidavit instead of deciding by himself to proceed with late filing. His act cannot be condoned as doing so will open the door for disobedience of court's orders and parties choosing to file their pleadings as they are pleased. In the light of the foregoing the counter affidavit was expunged from and ceased to be part of the record. Moving back to the main application, as mentioned earlier, at the CMA the proceedings were held ex parte following non attendance of the respondent, the applicant being the sole witness. The applicant testified that he was unfairly terminated after the respondent alleging that he stole money amounting to TZS. 150,000,000/=. That he was arrested, searched and on 15/8/2012 he faced criminal charges together with other 2 employees and then his employment was terminated. That, the termination did not follow any procedure because he was just given a termination letter. The application added that he appealed against the

decision issued by the criminal court and the High Court set him free. That, there are no pending charges against him whatsoever. In support of his 5 testimony, he tendered his termination letter (SM1), termination letters of 'Samwel' and 'Ellesi' (SM2 and SM3), A judgment against him issued by Nyamagana District Court in Criminal Case no. 557/2012 (SM4). A High Court Order in Criminal Appeal no. 128/2015 (SM5) and a letter inviting him to a Disciplinary Meeting (SM6). When the application was scheduled for hearing, as mentioned the respondent did not appear and the applicant's personal representative Mr. Marwa Chacha Kisyeri, moved the court for an ex parte order. He also requested for hearing to proceed by way of written submissions because the applicant resides in Tabora. Both prayers were granted. In his submission, first, the applicant started by moving the court to issue a default judgment in terms of Rule 37 of the Labour Court Rules, GN 106/2007 because the counter affidavit was expunged from records. I will disagree with the applicant's prayer because, first, the court had already issued an order that hearing should proceed ex parte. Therefore, on top of that ex parte order, through his written submissions, the applicant cannot move the court for a judgment in default. Secondly, Rule 37 is not coached in mandatory terms therefore, it is court's discretion to enter a judgment in default upon being properly moved and upon 6 having valid grounds. The court cannot automatically enter judgement in default due to lack of counter affidavit. It has a duty to go through records and ascertain whether there is anything worth to revise or not. Moving to the merit or otherwise of this application, the applicant has raised 11 grounds and I will consider them holistically because they are related and some are repeated. I have cautiously gone through the applicant's affidavit, the CMA form no. 1, CMA records and submissions, basically, the issues to be resolved are:

- i. Whether there was valid reason for terminating the applicant's employment. ii. Whether the procedures for termination were adhered. iii. What are the reliefs to parties? The Employment and Labour Relations Act, No. 6 of 2004 herein the ELRA, defines unfair termination under Section 37(2) as follows: '(1) It shall be unlawful for an employer to terminate the employment of the employee unfairly
- (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - (a) That the reasons for termination is valid; 7
 - (b) That the reason is a fair reason-
 - (i) Related to the employee's conduct, capacity or compatibility; or (ii) N/A
 - (c) That the employer was terminated according to a fair procedure.' Emphasis supplied.
- (3) N/A
- (4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99.

- (5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto. Construing from these provisions, first it is the duty of the employer to prove that termination was lawful. According to records and the applicant's counsel. submissions, grounds for termination were stealing and occasioning loss amounting to TZS 150,000,000/=. Starting with substantive fairness, in essence, the applicant is challenging the CMA reliance on the District Court's decision while there was no issue 8 framed at the CMA regarding criminal case and the said criminal allegations were refuted by the High Court. He added that, there was procedural irregularity towards his termination. He gave examples that the summons to disciplinary hearing was issued after dismissal, there was no investigation report against the applicant and there was no notice issued to the applicant before termination among others. The applicant is also complaining on the reliefs awarded by the CMA because he believe he deserved maximum compensation, daily allowance and transport costs from Mwanza to Kahama. However, it is noted that, the applicant produced before the CMA, a court's judgment (SM4) where The District Court of found him guilty of two offences; stealing by servant and possession of goods suspected been unlawfully acquired. He was sentenced to three (3) years imprisonment for the 1st count and two (2) years for the 2nd count, both sentences to run concurrently. I have gone through the District Court's decision and contrary to the applicant's aversion, at page 4, it states clearly that there is sufficient evidence to prove the offences against the applicant. Part of the District Court judgment stated: 9 '.... for those reasons, this court finds the accused guilty of offence of stealing by servant and possession of goods suspected having unlawful acquired....' In my view, this is the evidence which was brought to the CMA by the applicant himself squarely implicates him. Further, I have gone through the High Court proceedings (SM5) which is actually not a judgment but an order, and if I can quote part of the order, it says:- '....I remit the file to the trial court with directions that the trial magistrate to find the appellant guilty, enter conviction and sentence him accordingly' The essence of the order is that the trial court found the applicant guilty and sentenced him. However, it omitted to convict the applicant. An order was issued for the trial court to enter conviction before appeal is entertained. There is no record whether the trial court complied with the said order and what transpired after that. Therefore, based on these records, I do not see anywhere the District or High Court declaring the applicant innocent. In addition to that, although the case was heard ex parte, the applicant did not show in any way why he says he was never involved in 10 the alleged stealing and why the District Court decision should not be reliable. He just gives a blanket denial that he was not involved in any stealing. Under the circumstance, I will agree with the CMA reasoning that, based on the decision of the District Court which has never been challenged, there was ample evidence that the applicant occasioned loss to the respondent, an act the which amount to gross misconduct. Thus, the first issue is answered positively. In respect fairness of procedure, rule 13 of GN 42/2007 requires among others, for the employer to conduct investigation to ascertain whether there are grounds for a disciplinary hearing to be held. Further, under Rule 13 (5) as quoted hereinabove, if there

are any criminal charges against the employees on the same offence which is termed as misconduct, then termination cannot take place until final determination of the said criminal case. In this case, as rightly observed by the CMA that there were procedural irregularities because the applicant was not subjected to Disciplinary Hearing and investigation was not done. In addition to that, the applicant was not supposed to be terminated before the criminal charges are concluded as provided for under regulation 13(5). I am not far from the CMA observation that there was procedural irregularity in the termination of employment of the applicant. Thus, the 2nd issue is answered in the negative. Coming to the reliefs, according to the CMA form no. 1 the applicant had prayed for several benefits including terminal benefits amounting to TZS 48,466,000/= and general damages of TZS 50,000,000/=. Because the termination is found to be procedurally unfair, I find that the CMA was justified to award the applicant a compensation of 12 months salaries as provided for under section 40(1)(c) of the ELRA. I also agree with the CMA that the applicant deserve the certificate of service. Contrary to the CMA observation that the applicant did not prove that he was employed at Kahama Shinyanga, I have noted that this fact appears in his CMA form no.1 and even in his testimony before CMA. Being a witness he has all the rights to be believed unless there are other grounds to the contrary. I do not think that it was necessary for the applicant to bring the employment letter and leave forms to prove that he was employed at Kahama. This is because he stated in his testimony that his employment agreement was made orally so the employment letter is inapplicable. Also, it is not necessary that he should go to Kahama for leave. Therefore, the applicant is entitled to allowance for transport of himself and his personal effect to Kahama, Shinyanga the place of recruitment in terms of section 43 of the ELRA. An allowance shall be equal to at least a bus fare to the bus station nearest to the place of recruitment. As for the rest of the claims including severance pay and notice, I agree with the CMA that in terms of section 42(3)(a) of the ELRA, those claims are not justified because the applicant was terminated for misconduct. In respect of damages, I agree with the CMA that the applicant do not deserve any because the delay in decisions was not caused by the respondent but by the ongoing litigations. And, I did not see any evidence to support the alleged damage suffered. To sum up, the applicant should be remedied as follows:-

- i. Compensation of twelve (12) months salaries at the rate of TZS 485,000/= which is TZS 5,820,000/=. ii. Transportation allowance for the applicant and his personal effects, equal to at least a bus fare to the bus station nearest to the place of recruitment and iii. Certificate of service. 13 Finally, the application for Revision is hereby partly allowed to the extent shown. No orders as to costs this being labour court's proceedings. It is ordered. Dated at MWANZA this 24th Day of May 2024. L.K.J. ITEMBA JUDGE 24/5/2024 Judgement delivered in the presence of the applicant and Mr. Marwa Chacha Kisyeri his personal representative, Mr. Kyaringa Makongoro for the respondent appearing remotely via audio conference and Ms. Gladys Mnjari, RMA. L.K.J. ITEMBA JUDGE 24/5/2024 14

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Prepared on 14 October 2026 · Esheria